

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HELEN MCCULLOUGH,

Plaintiff,

v.

THE TRAVELERS HOME AND MARINE  
INSURANCE COMPANY,

Defendant.

CASE NO. C17-1234-JCC

ORDER

This matter comes before the Court on Plaintiff's motion to amend her complaint and remand to state court (Dkt. No. 16). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

**I. BACKGROUND**

In early 2015, Helen McCullough's ("McCullough") house began to settle around her two-story fireplace. (Dkt. No. 17 at 7.) At all relevant times, McCullough had a homeowner's insurance policy issued by Travelers Home and Marine Insurance Company ("Travelers"). (Dkt. No. 1-2 at 2.) After an initial inspection, Travelers determined that the settling damage was a loss covered by McCullough's policy (Dkt. No. 17 at 8.)

Travelers hired an independent consultant, Done Right Construction ("Done Right"), to

1 prepare a repair estimate for McCullough's home. (*Id.*) Done Right provided Travelers with an  
2 initial scope of repair estimate totaling \$57,437.65. (Dkt. No. 17 at 16.) Travelers accepted the  
3 estimate and issued payment to McCullough. (*Id.*) McCullough subsequently hired Done Right  
4 to be the general contractor for the repair of her house. (*Id.*)

5 From the outset, McCullough experienced construction delays that appeared to be caused  
6 by Done Right. (*Id.* at 7, 16.) McCullough, Travelers, and Done Right repeatedly exchanged  
7 correspondence to determine the progress of the repairs. (*See generally id.* at 46-53.) In  
8 December 2016, Done Right submitted an updated scope of work estimate totaling \$144,122.14  
9 (*Id.* at 17.) Travelers accepted the estimate and issued payment to McCullough. (*Id.*)

10 McCullough eventually terminated Done Right after she made several attempts to get the  
11 company to finish the repairs to her house. (*Id.* at 17–18.) In May 2017, McCullough filed suit  
12 against Travelers in Snohomish County Superior Court alleging the company had breached its  
13 contract, violated the Washington Consumer Protection Act, and acted in bad faith. (Dkt. No. 1-2  
14 at 3–5.) Travelers removed the case to this Court on August 15, 2017. (Dkt. No. 1.)

15 After filing suit, McCullough hired a third-party contractor to provide an updated scope  
16 of repair estimate. (Dkt. No. 17 at 18.) The contractor provided an estimate totaling  
17 \$291,165.90—an amount well above McCullough's policy limit for structural damage. (*Id.*) In  
18 light of that estimate, McCullough requested that Travelers pay her the policy limit. (*Id.*)  
19 Travelers declined. (*Id.*) McCullough subsequently filed notice with Travelers and the  
20 Washington Insurance Commission that alleged Travelers violated the Washington Insurance  
21 Fair Conduct Act ("IFCA"), Revised Code of Washington § 48.30.015. (*Id.* at 15.)

22 McCullough now moves the Court for three things: (1) leave to amend her complaint to  
23 add a claim against Travelers for violation of IFCA; (2) leave to amend her complaint to join  
24 Done Right as a defendant and assert claims of breach of contract, conversion, and violation of  
25 the Consumer Protection Act; and (3) assuming the Court joins Done Right, to remand the case  
26 to Snohomish County Superior Court because there would no longer be complete diversity of

1 citizenship. (Dkt. No. 16 at 1.) The Court addresses these issues in turn.

## 2 **II. DISCUSSION**

### 3 **A. Amendment to Add IFCA Claim**

4 District courts are afforded discretion to grant leave to amend and “should freely give  
5 leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The generosity in granting leave to  
6 amend is “to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
7 F.3d 1048, 1051–52 (9th Cir. 2003). Courts are to consider five factors in granting leave to  
8 amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of  
9 amendment, and (5) whether the pleading has previously been amended. *See United States v.*  
10 *Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

11 The above factors weigh in favor of granting McCullough leave to amend her complaint  
12 to add an IFCA claim against Travelers. McCullough does not seek to amend in bad faith: she  
13 wants to add this claim based on Traveler’s denial of her request for the policy limit, which  
14 occurred after she filed her lawsuit. (Dkt. No. 17 at 18.) She did not act with undue delay: her  
15 amendment comes less than two months after she gave statutorily-required notice to Travelers  
16 that she planned to file an IFCA claim and less than a month after Travelers refused to settle the  
17 claim. (*Id.* at 7–11.) Travelers is not prejudiced by the amendment: McCullough provided notice  
18 that she intended to file the claim and it arises out of the same insurance dispute as her other  
19 claims. McCullough has not previously amended her complaint and her IFCA claim would not  
20 be futile.

21 Travelers raises a single objection to McCullough’s amendment. The IFCA states that  
22 “Twenty days prior to filing an action based on this section, a first party claimant must provide  
23 written notice of the basis for the cause of action to the insurer and office of the insurance  
24 commissioner.” Rev. Code of Wash. § 48.30.015(8)(a). Because McCullough filed her lawsuit  
25 months before she filed her IFCA notice, Travelers argues that her claim is untimely. The Court  
26 disagrees with Travelers’ narrow reading of the statute. The statute requires a party to provide

1 timely notice of the basis for bringing an IFCA claim—whether the 20-day notice occurs before  
2 a lawsuit commences or after an amendment to an existing lawsuit is irrelevant. Travelers offers  
3 no authority in support of its position, which, if accepted, would lead to anomalous results.

4 For those reasons, the Court GRANTS McCullough leave to amend her complaint to add  
5 an IFCA claim against Travelers.

6 **B. Amendment to Join Done Right**

7 Generally, a party's motion to amend a complaint to join a party would be analyzed under  
8 Federal Rule of Civil Procedure 15. The standard is different, however, where a plaintiff  
9 attempts to join a non-diverse party in a case that has been removed to federal court based on  
10 diversity jurisdiction. "If after removal the plaintiff seeks to join additional defendants whose  
11 joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder  
12 and remand the action to State court." 28 U.S.C. § 1447(e). The decision to grant or deny joinder  
13 of a non-diverse party belongs to the district court's discretion. *Newcombe v. Adolf Coors Co.*,  
14 157 F.3d 686, 691 (9th Cir. 1998). In exercising this discretion, courts generally consider the  
15 following factors:

16 (1) Whether the party sought to be joined is needed for just adjudication and would  
17 be joined under Federal Rule of Civil Procedure 19(a); (2) Whether the statute of  
18 limitations would preclude an original action against the new defendants in state  
19 court; (3) Whether there has been unexplained delay in requesting joinder;  
20 (4) Whether joinder is intended solely to defeat federal jurisdiction; (5) Whether  
the claims against the new defendant appear valid; and (6) Whether denial of  
joinder will prejudice the plaintiff.

21 *IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d  
22 1008, 1011 (N.D. Cal. 2000). The parties agree that the Court should apply these factors to reach  
23 its decision. (Dkt. Nos. 16 at 11, 19 at 2.)

24 **1. Just Adjudication and Rule 19**

25 Under Federal Rule of Civil Procedure 19(a), a person must be joined as a party if his or  
26 her absence would prevent a court from providing complete relief to the existing parties or leave

1 an existing party subject to inconsistent obligations. While the Court should consider the Rule 19  
2 standard when deciding whether a non-diverse party should be joined, an amendment under  
3 § 1447(e) is less restrictive than the Rule 19 standard. *IBC Aviation Servs., Inc.*, 125 F. Supp. 2d  
4 at 1011–12. McCullough asserts that Done Right is a necessary party because, in concert with  
5 Travelers, it caused her an “indivisible injury.” (Dkt. No. 16 at 11.) McCullough asserts that both  
6 Done Right and Travelers were responsible for the changing scope of repair estimates and  
7 construction delays that caused her to incur economic and non-economic harm. (*Id.* at 10–11.)  
8 Travelers argues that “the claims against Travelers and [Done Right] are only tangentially  
9 related.” (Dkt. No. 19 at 4.)

10       While the Court agrees with Travelers that Done Right would not be subject to  
11 mandatory joinder under Rule 19, McCullough’s claims against both parties are sufficiently  
12 related such that Done Right’s inclusion in the lawsuit would lead to a just adjudication of the  
13 entire dispute. Travelers engaged Done Right to provide an initial scope of repair for the covered  
14 loss to McCullough’s house. (Dkt. No. 17 at 8.) Although Travelers asserts that it did not force  
15 McCullough to hire Done Right to complete the repairs, Travelers obtained an updated scope of  
16 repair from Done Right long after it had begun work on McCullough’s house. (*Id.* at 17.)  
17 McCullough’s allegations that Travelers failed to reasonably investigate and timely pay her  
18 claim are wrapped up with the same factual questions regarding whether Done Right breached its  
19 contract with McCullough by failing to adequately estimate the damage and complete its repairs  
20 in a timely manner. (*Id.* at 15–21.) Moreover, it appears that Travelers could raise defenses to  
21 some of McCullough’s claims that would implicate Done Right and therefore make it an  
22 appropriate party to the litigation. (*See generally id.* at 7–11.)

23       The Court need not resolve the parties’ dispute regarding whether Travelers and Done  
24 Right shared a principal/agent relationship or whether the parties are jointly and severally liable.  
25 (Dkt. No. 19 at 7.) It is enough for the Court to find that Done Right is centrally involved in  
26 McCullough’s claims against Travelers, which weighs in favor of permitting joinder.

1                   2. Statute of Limitations

2                   McCullough does not assert that her claims would be time-barred if the Court refused to  
3 join Done Right. Accordingly, this factor weighs against permitting joinder.

4                   3. Unexplained Delay in Requesting Joinder

5                   Travelers argues that McCullough “has provided no real explanation for her delay in  
6 joining [Done Right].” (Dkt. No. 19 at 5.) McCullough filed her lawsuit against Travelers in May  
7 2017, but as early as June 2017, she had sent Done Right a demand letter seeking return of all  
8 insurance funds it had been paid to that date. (Dkt. No. 17 at 58.) This correspondence  
9 demonstrates that McCullough was aware that she had a cause of action against Done Right  
10 since around the time she filed suit against Travelers. In addition, Travelers points out that  
11 McCullough suggested that she might seek to join Done Right in August 2017, but then waited  
12 four months to move for joinder. (*Id.* at 61.) McCullough asserts that she “moved without delay  
13 to join [Done Right] upon receiving Travelers’ ultimate denial of benefits on November 20,  
14 2017.” (Dkt. No. 16 at 12.) McCullough’s attorney stated by declaration that he “hoped that if  
15 Travelers agreed to issue payment of the policy benefits, I would be able to resolve Ms.  
16 McCullough’s claims against Done Right Construction either without litigation or in a less  
17 expensive forum, e.g. arbitration.” (Dkt. No. 17 at 2–3.)

18                   The Court does not find McCullough’s explanations for its delay in joining Done Right  
19 persuasive. McCullough waited for more than six months from the time it filed its lawsuit against  
20 Travelers to file this amendment to join Done Right, despite the fact that it knew it could bring  
21 its claims against the latter. Notwithstanding McCullough’s apparent tactical decision to try and  
22 informally resolve her claims with Travelers before joining Done Right, the Court finds that the  
23 delay from removal to seeking amendment weighs against permitting joinder.

24                   4. Motive for Joinder

25                   The joinder of non-diverse defendants for the sole purpose of divesting a federal court of  
26 diversity jurisdiction is improper, and courts should closely scrutinize such attempts. *Desert*

1 *Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1376 (9th Cir. 1980). Based on the record, the  
2 Court cannot conclude that McCullough's sole purpose for joining Done Right is to destroy  
3 subject matter jurisdiction. As noted above, McCullough has legal claims against Done Right  
4 that overlap closely with her factual allegations against Travelers. (Dkt. No. 17 at 15–18.) Even  
5 before Travelers removed this case from state court, McCullough had intimated that she expected  
6 to join Done Right to the lawsuit. (*Id.* at 61.)

7 Travelers argues that McCullough's delay in seeking joinder demonstrates that  
8 McCullough's purpose is to divest the Court of jurisdiction. (Dkt. No. 19 at 6.) While the Court  
9 agrees that McCullough's delay counts as a strike against permitting joinder, it does not evince  
10 an intent to foil removal. Part of the delay was caused by McCullough's attempt to informally  
11 resolve her claims against the parties. (Dkt. No. 17 at 2–3.) Moreover, the Court can envision  
12 many reasons for why McCullough would want Travelers and Done Right in the same lawsuit: to  
13 conserve resources, address common issues of fact once, and reach a final resolution of all  
14 claims. Although McCullough's delay in seeking joinder may have been a tactical error, it does  
15 not convince the Court that her motion to amend is made in bad faith. Accordingly, this factor  
16 weighs in favor of permitting joinder.

#### 17 5. Validity of McCullough's Claims Against Done Right

18 Travelers concedes that McCullough's proposed claims against Done Right may be valid.  
19 Indeed, Travelers communicated to McCullough that Done Right was largely responsible for the  
20 delays to the payment of her claim and repair of her house. (Dkt. No. 17 at 7–10.) Because  
21 McCullough's claims are valid, this factor weighs in favor of permitting joinder.

#### 22 6. Prejudice from Denying Joinder

23 A plaintiff always suffers some degree of prejudice when she is forced to litigate separate  
24 lawsuits that deal with common questions of law or fact. *See Milton v. Xerox Corp.*, No. C15-  
25 5618-BHS, slip op. at 4 (W.D. Wash. Feb. 18, 2016). Prejudice arises because the plaintiff has to  
26 expend additional resources, and face the potential for conflicting rulings or inconsistent

1 outcomes. McCullough could face this kind of prejudice if joinder is denied. She also argues that  
2 if Done Right is not joined she “may lose the ability to assert joint and several liability, and may  
3 be unable to collect the full amount of her damages from either defendant.” (Dkt. No. 16 at 12.)

4 Travelers argues that McCullough will not be prejudiced because her claims against each  
5 party are not “factually interrelated,” and she has not “alleged any claim in her proposed  
6 Amended Complaint that would result in joint and several liability.” (Dkt. No. 19 at 7.) The  
7 Court agrees with Travelers that McCullough has not specifically demonstrated how adjudication  
8 of her claims against Travelers and Done Right could prevent McCullough from collecting the  
9 full amount of her damages from either Defendant in separate lawsuits. (Dkt. No. 16 at 12.) In  
10 particular, the Court does not perceive how Travelers could be held liable for the claims against  
11 Done Right. Nevertheless, the Court disagrees with Travelers that McCullough’s claims against  
12 the parties are not factually interrelated. *See supra* Part II.B.1. At any rate, the Court finds that  
13 the issue of prejudice is neutral to its decision regarding joinder.

14 In balancing the above factors, the Court concludes that joinder should be permitted in  
15 this case. McCullough’s motion to amend her complaint to join Done Right is GRANTED.

### 16 **C. McCullough’s Motion for Remand**

17 Diversity Jurisdiction only exists if there is complete diversity among the parties and the  
18 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *see also, Strawbridge v. Curtiss*, 7  
19 U.S. 267, (1806). The parties agree that for the purposes of diversity McCullough and Done  
20 Right are citizens of Washington. (Dkt. Nos. 17 at 67, 19 at 8.) Based on the Court’s ruling  
21 granting McCullough’s amendment to join Done Right, it no longer has subject matter  
22 jurisdiction over this case. Accordingly, McCullough’s motion to remand is GRANTED.

### 23 **III. CONCLUSION**

24 For the foregoing reasons, McCullough’s motion to amend and remand (Dkt. No. 16) is  
25 GRANTED. Within seven (7) days from the issuance of this order, McCullough shall FILE an  
26 amended complaint that is substantially similar to the proposed complaint attached with her



1 motion as exhibit 16. (Dkt. No. 17 at 66–82.) Once McCullough has filed her amended  
2 complaint, the Clerk of Court is DIRECTED to remand this case to Snohomish County Superior  
3 Court.

4 DATED this 27th day of December 2017.

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8 John C. Coughenour  
9 UNITED STATES DISTRICT JUDGE  
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